

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

WESLIE MARTIN,

Plaintiff,

v.

LONA, et al.,

Defendants.

Case No. 2:18-cv-02426-RFB-NJK

ORDER

I. INTRODUCTION

Before the Court are three motions: Defendant Efrain Lona (“Defendant”)’s Motion for Summary Judgment (ECF No. 93); Plaintiff Weslie Martin (“Plaintiff”)’s Amended Motion for Summary Judgment (ECF No. 98), and Plaintiff’s Motion for Reconsideration of the Court’s Order (ECF No. 100) dismissing all claims against Defendant William Wharton (ECF No. 101). For the reasons. For the reasons stated below, Defendant’s Motion for Summary Judgment is granted in part and denied in part, Plaintiff’s Motion for Summary Judgment is denied, and Plaintiff’s Motion for Reconsideration is granted.

II. PROCEDURAL BACKGROUND

On December 26, 2018, Plaintiff commenced this case by filing an application to proceed in forma pauperis to which he attached a proposed complaint. ECF No. 1-1. On August 30, 2019, Plaintiff filed a preliminary injunction and temporary restraining order. ECF Nos. 3, 4. On October 16, 2019, Plaintiff filed a Motion for Appointment of Counsel. ECF No. 14. On February 5, 2020, Plaintiff filed a Motion to Amend the Complaint. ECF No. 17. At that point, the original complaint had not been screened.

1 The next day, February 6, 2020, the Court screened Plaintiff's complaint, deferred ruling
2 on Plaintiff's in forma pauperis application, and stayed the case for ninety days to allow the parties
3 a chance to settle the dispute. ECF No. 18. The Clerk filed the screened complaint. ECF No. 19.
4 The same day, Plaintiff filed an amended complaint. ECF No. 17. Also on February 6, 2020, the
5 Court denied Plaintiff's motions for injunctive relief and his motion to amend his Complaint
6 without prejudice. ECF No. 20.

7 The Inmate Early Mediation Conference took place on October 16, 2020. ECF No. 29. A
8 settlement was not reached. Id. On October 19, 2020, the Court granted Plaintiff's application to
9 proceed in forma pauperis and lifted the stay. ECF No. 31. On November 16, 2020, Plaintiff filed
10 a Motion to Compel. ECF No. 33. Specifically, Plaintiff requested that the Court require the
11 Attorney General's Office to accept service on behalf of all Defendants. Id.

12 On December 17, 2020, Defendant Lona filed a Motion to Dismiss the Complaint. ECF
13 No. 35. On December 30, 2020, the Court granted Plaintiff's Motion to Compel in part, requiring
14 the Nevada Attorney General's office to either file a notice either (1) attesting that it could not
15 locate officers Dubree or Warden after a diligent search or (2) submitting the names and last known
16 addresses of these defendants, ex parte, and under. On January 11, 2021, the Attorney General's
17 office complied with this Court order. ECF No. 43. On December 17, 2020, Plaintiff filed a
18 second Motion for Preliminary Injunction. ECF No. 36. On February 10, 2021, Plaintiff filed a
19 Motion to Correct the Names of All Defendants. ECF No. 47.

20 On March 9, 2021, the Court granted Plaintiff's Motion and ordered the Clerk to change
21 the Names of "Officer Dubree" and "Officer Warden" on the Complaint to Mark Dubree and
22 William Wharton, respectively. ECF No. 48. The order further directed service of the summons
23 under seal by the U.S. Marshal's office. Id. On April 16, 2021, Plaintiff filed a Motion for entry
24 of Clerk's Default as to Defendants Dubree and Wharton. ECF No. 52. On April 21, 2021,
25 Defendant Lona filed a Notice of Plaintiff's non-opposition to the pending Motion to Dismiss.
26 ECF No. 53. On July 22, 2021, Plaintiff filed a Motion to Begin the Discovery Process. ECF No.
27 55. On June 25, 2021, The Court dismissed all claims against Dubree and Warden without
28 prejudice for failure to comply with service requirements pursuant to Fed. R. Civ. P. 4(m). ECF

1 No. 56. On June 30, 2021, Plaintiff filed a Motion for Reconsideration of the Court's Order
2 dismissing these defendants from the lawsuit. ECF No. 57.

3 On July 17, 2021, the Court granted Defendant Lona's Motion to Dismiss (ECF No. 25)
4 and dismissed all claims seeking damages from individual defendants (in their official capacities).
5 ECF No. 58. The Court's July 17, 2021 Order further denied Plaintiff's Motion for Preliminary
6 Injunction (ECF No. 36). Id. On July 23, 2021, the Court granted Plaintiff's Motion to Begin the
7 Discovery Process (ECF No. 55). ECF No. 59. On July 28, 2021, the Court returned Plaintiff's
8 request for production of documents, that he filed with the Court, informing him that such
9 documentation was not to be shared with the Court. ECF No. 60.

10 On August 4, 2021, Defendant Lona answered the Complaint. ECF No. 61. On August 4,
11 2021, Plaintiff filed a "Motion for Summary Judgment / Default Judgment in part." ECF No. 62.
12 On August 30, 2021, Plaintiff filed a Notice of Defendant's Non Opposition to his motion. ECF
13 No. 63. On July 7, 2021, Plaintiff filed a Motion to Compel Discovery. ECF No. 64. On
14 September 8, 2021, Defendant Lona sought an extension of time to file opposition to Plaintiff's
15 Motion for Summary Judgment. ECF No. 65. On September 13, 2021, Plaintiff filed a second
16 Motion to compel Discovery. ECF No. 66. On September 20, 2021, the Court granted Defendant's
17 request for an extension of time and ordered Defendant Lona's response to Plaintiff's Motion for
18 Partial Summary Judgment to be filed by September 24, 2021. ECF No. 68.

19 The Court denied Plaintiff's Motions to Compel on October 28, 2021 without prejudice.
20 The Court warned the parties that it would consider sanctioning the parties if they were unable to
21 meet and confer in good faith. ECF No. 75. On November 4, 2021, Plaintiff filed a Notice of
22 Discovery Requests. ECF No. 76. On November 9, 2021, Plaintiff filed a Notice of Attempted
23 Meet and Confer. ECF No. 78.

24 On November 29, 2021, the Court held a hearing on the following Motions: Plaintiff's
25 Motion for Entry of Clerk's Default (ECF No. 52), Plaintiff's Motion for Reconsideration of the
26 Court's prior Order (ECF No. 57), and Plaintiff's Motion for Partial Summary Judgment. ECF
27 No. 82. At that hearing, the Court granted Plaintiff's Motion for Reconsideration (ECF No. 52)
28 and found Plaintiff had complied with all service requirements. Id. The Court reinstated the claims

1 against William Wharton and Mark Dubree and granted Plaintiff's Motion for Clerk's Default as
2 to these defendants (ECF No. 52). Id. The Court further denied Plaintiff's Motion for Partial
3 Summary Judgment as premature, and ordered that Plaintiff receive a paper copy of his medical
4 records by December 10, 2021. Id.

5 On December 2, 2021, Plaintiff filed a Motion for Default Judgement. ECF No. 83. On
6 December 23, 2021, Plaintiff filed a Notice on the results of the meet and confer held on December
7 22, 2021. ECF No. 86. On December 27, 2021, Defendants filed a Notice Regarding the Court's
8 Minute Order. ECF No. 87. On January 6, 2022, Plaintiff filed a Notice to the Court that
9 Discovery had been completed. ECF No. 88. On February 15, 2022, the Court granted Defendant
10 Lona's request to extend the dispositive motion deadline to March 21, 2022. On March 21, 2022,
11 Defendant Lona filed a Motion for Summary Judgement. ECF No. 93. On March 23, 2022,
12 Plaintiff filed his response to Defendant Lona's motion. ECF No. 95. Plaintiff also filed
13 miscellaneous exhibits to his Complaint (ECF No. 19) the following day. ECF No. 96. Defendant
14 Lona filed his reply in support of his motion on April 6, 2022. ECF No. 97. On April 8, 2022,
15 Plaintiff filed an Amended Motion for Summary Judgment. ECF No. 98. On April 29, 2022,
16 Defendant Lona filed his Response. ECF No. 99.

17 On May 4, 2022, the Court dismissed the action without prejudice as to Defendant William
18 Wharton. ECF No. 100. On May 9, 2022, Plaintiff filed a Motion for Reconsideration of the
19 Court's May 4, 2022 order (ECF No. 100). ECF No. 101. On August 4, 2022, the Court denied
20 Plaintiff's Motion for Default Judgment. ECF No. 102. On January 24, 2023, the Court set a
21 hearing on all pending motions. ECF No. 104. The Hearing was held on February 7, 2023. ECF
22 No. 106. The Court took the pending motions under submission. Id. This Order follows.

23 24 **III. FACTUAL BACKGROUND**

25 For the purposes of this motion, the Court finds the following facts to be undisputed:

26 Plaintiff is currently housed at Ely State Prison but was previously housed at High Desert
27 State Prison (HDSP). Plaintiff was incarcerated at HDSP from April 6, 2016, to February 12,
28 2018. Plaintiff returned to NDOC custody on September 13, 2018. ECF No. 93-1.

1 On January 30, 2018, thirteen days before Plaintiff's release, Lona reported a spontaneous
2 use of force on Plaintiff after conducting a random cell search in Plaintiff's cell. ECF No. 93-2.
3 Lona ordered Plaintiff and his cellmate to place their hands on the wall. Id. While Lona was
4 placing Plaintiff in handcuffs, Plaintiff was shouting various statements. Id. Lona then took
5 Plaintiff to the ground. Id. On the floor, Plaintiff yelled profane statements to Lona, and asked
6 Lona to take him out of his handcuffs. Id. Plaintiff was taken to segregation. Id. A release of
7 liability for refusal of health care form was completed on January 30, 2018. ECF No. 93-4.
8 Plaintiff did not sign this form. Id. There is no treatment listed as being offered. Id. Instead, the
9 area related to "health care treatment . . . refused at this time" is marked "Other[,] Describe;" no
10 description was provided by the officer or NDOC employee preparing the form. Id.

11 Plaintiff was released from custody on February 12, 2018. Plaintiff returned to custody on
12 September 13, 2018. On November 5, 2018, two months after arriving in custody for the second
13 time, Plaintiff filed a grievance related to the January 30, 2018 incident. Plaintiff's Grievance
14 explains that he "came back to [his] cell to find everything completely trashed . . . I immediately
15 noticed my previous lawsuit paperwork in the toilet along with grievance receipts, and paperwork
16 from my case." Plaintiff's grievance goes on to state that after the incident, he was "taken to the
17 hole" and that he was then told "all [his] property had been lost including legal/personal property."
18 The Grievance was denied on November 14, 2018 for being untimely because it was filed over six
19 months after the incident.

20 The Court finds that the parties dispute the following facts in relation to the January 30,
21 2018 incident: whether, during the cell search, Plaintiff's legal papers and court documents had
22 been placed in a toilet; whether Plaintiff and his cellmate stood at the top of the stairs shouting and
23 using profane language complaining of the state of their cell after the random cell search; whether
24 Plaintiff complied with Lona's initial request that he place his hands on the wall; whether, while
25 being handcuffed, Plaintiff complained of the tightness of the handcuffs; whether Plaintiff used
26 profane statements while in restraints or being placed in restraints by Lona and if so, whether these
27 statements were threatening; whether Lona struck Plaintiff in the face and if so, how many times;
28 whether and how Lona threw Plaintiff on his back; whether Lona asked Plaintiff whether Lona

1 tried to place Plaintiff in a headlock; whether Lona asked Plaintiff to get down to his knees, and if
 2 so when; whether the Plaintiff complied with that request, if it was made; when and how other
 3 officers responded to the scene; why Lona did not file a report after the incident; whether medical
 4 teams were called and by whom; what care was offered and visible signs of injuries at the time
 5 medical staff arrived, if they did arrive on the scene; whether Plaintiff requested an emergency
 6 grievance form after the incident while in segregation, and when Plaintiff was placed in
 7 segregation.

9 **IV. LEGAL STANDARD**

10 **A. Summary Judgment**

11 Summary judgment is appropriate when the pleadings, depositions, answers to
 12 interrogatories, and admissions on file, together with the affidavits, if any, show “that there is no
 13 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
 14 Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322(1986). When considering
 15 the propriety of summary judgment, the court views all facts and draws all inferences in the light
 16 most favorable to the nonmoving party. Gonzalez v. City of Anaheim, 747 F.3d 789, 793 (9th Cir.
 17 2014). If the movant has carried its burden, the nonmoving party “must do more than simply
 18 show that there is some metaphysical doubt as to the material facts Where the record taken as
 19 a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine
 20 issue for trial.” Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (internal quotation
 21 marks omitted). It is improper for the Court to resolve genuine factual disputes or make credibility
 22 determinations at the summary judgment stage. Zetwick v. Cty. of Yolo, 850 F.3d 436, 441 (9th
 23 Cir. 2017) (citations omitted).

24 **B. Eighth Amendment Excessive Force Claim**

25 The Eighth Amendment forbids cruel and unusual punishment. In an excessive force case,
 26 prison officials violate the Eighth Amendment if they cause "the unnecessary and wanton infliction
 27 of pain." Hudson v. McMillian, 503 U.S. 1, 5, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992) (citations
 28 and quotation marks omitted). See also Furnace v. Sullivan, 705 F.3d 1021, 1027 (9th Cir. 2013).

1 The "core judicial inquiry" is "whether force was applied in a good-faith effort to maintain or
 2 restore discipline, or maliciously and sadistically to cause harm." Hudson, 503 U.S. at 6. Courts
 3 consider five factors in making this determination: (1) the extent of the injury suffered by the
 4 inmate; (2) the need for the use of force; (3) the relationship between the need and the level of
 5 force used; (4) the threat reasonably perceived by the responsible officials; and (5) any efforts
 6 made to mitigate the severity of the force used. Furnace, 705 F.3d at 1028-29 (citation and
 7 quotation marks omitted).

8 The extent of the injury suffered by the inmate or the "objective component" of the Eighth
 9 Amendment analysis, is "contextual and responsive to 'contemporary standards of decency.'" Hudson, 503 U.S. at 8 (citation omitted). "In the excessive force context . . . [w]hen prison
 10 officials maliciously and sadistically use force to cause harm, contemporary standards of decency
 11 always are violated. This is true whether or not significant injury is evident." Id. at 9.

12 **C. Eighth Amendment Deliberate Indifference to a Serious Medical Need** 13 **Claim** 14

15 The Eighth Amendment prohibits the imposition of cruel and unusual punishment and
 16 "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'" Estelle v. Gamble, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). A prison official
 17 violates the Eighth Amendment when he acts with "deliberate indifference" to the serious medical
 18 needs of an inmate. Farmer v. Brennan, 511 U.S. 825, 828, 114 S. Ct. 1970, 128 L. Ed. 2d 811
 19 (1994). "To establish an Eighth Amendment violation, a plaintiff must satisfy both an objective
 20 standard—that the deprivation was serious enough to constitute cruel and unusual punishment—
 21 and a subjective standard—deliberate indifference." Snow v. McDaniel, 681 F.3d 978, 985 (9th
 22 Cir. 2012). To establish the first prong, "the plaintiff must show a serious medical need by
 23 demonstrating that failure to treat a prisoner's condition could result in further significant injury or
 24 the unnecessary and wanton infliction of pain." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006)
 25 (internal quotations omitted).
 26

27 To satisfy the deliberate indifference prong, a plaintiff must show "(a) a purposeful act or
 28 failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the

indifference." Id. "Indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care." Id. (internal quotations omitted). When a prisoner alleges that delay of medical treatment evinces deliberate indifference, the prisoner must show that the delay led to further injury. See Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985) (holding that "mere delay of surgery, without more, is insufficient to state a claim of deliberate medical indifference").

V. DISCUSSION

The Court addresses the parties' cross Motion for Summary Judgment and then turns to Plaintiff's Motion for Reconsideration.

A. Plaintiff's Motion for Summary Judgment

Although Plaintiff presents various arguments in his moving papers, and in his sworn declarations in the record, he has not shown he is entitled to summary judgment as to his two claims. Furthermore, Plaintiff has affirmatively presented to the Court that he did not experience any difficulties during discovery. See ECF No. 88. Plaintiff offers medical documents from 2019 to demonstrate the scope of his back injuries. Plaintiff's informal grievance form, filed November 5, 2018, is the only document in the record that Plaintiff has signed under penalty of perjury, outside of the Complaint. Plaintiff is not entitled to summary judgment based purely on the record before the Court.

B. Defendant Lona's Motion, for Summary Judgment

Defendant Lona argues that the Court should grant its Motion for Summary Judgment for three reasons. First, Plaintiff did not exhaust all available administrative remedies. Second, Plaintiff is unable to establish the required elements of excessive force because Plaintiff suffered no injury and there was no sadistic or malicious purpose to Defendant Lona's actions. Finally, Lona was not deliberately indifferent to Plaintiff's medical need because Plaintiff suffered no injury and refused medical treatment. The Court considers each of these arguments in turn.

a. Exhaustion of Administrative Remedies

Defendant first argues that the Court should grant its Motion for Summary Judgment

1 because Plaintiff has failed to exhaust administrative remedies. The issue of exhaustion "should
 2 be decided, if feasible, before reaching the merits of a prisoner's claim." Albino v. Baca, 747 F.3d
 3 1162, 1170 (9th Cir. 2014). "If undisputed evidence viewed in the light most favorable to the
 4 prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56.
 5 If material facts are disputed, summary judgment should be denied, and the district judge rather
 6 than a jury should determine the facts." Id. at 1166. It is Defendant's burden of proving that an
 7 available administrative remedy was unexhausted by the inmate. Id. at 1172. Where
 8 circumstances render administrative remedies "effectively unavailable," an inmate's failure to
 9 exhaust is excused. Sapp v. Kimbrell, 623 F.3d 813, 824 (9th Cir. 2010), superseded by statute,
 10 Cal. Code Regs. tit. 15, § 3084.2. Although California prison regulations were changed after the
 11 Ninth Circuit's ruling in Sapp, that case remains binding precedent as to what a prisoner must do
 12 to put prison officials on "adequate notice of the problem for which the prisoner seeks redress"
 13 and what factors determine whether administrative remedies were "effectively unavailable." Id.

14 Defendant Lona argues that the claim is unexhausted under AR 740.05(6) because Plaintiff
 15 has failed to state a requested remedy, when prison regulations required him to do so. Plaintiff
 16 does not explicitly describe the remedy he seeks in his grievance, but he does explain that he does
 17 not feel comfortable with Defendant Lona after the incident and describes the incident in detail.

18 AR 740.05(6) states in relevant part:

19
 20 "All grievances submitted should also include the remedy sought by the
 inmate to resolve this claim.

21 A. Failure to submit a remedy will be considered an improper
 22 grievance shall be DISMISSED. the grievance will then be returned
 23 to the inmate using Form DOC-3098, Improper Grievance
 Memorandum, except any grievance or portion of a grievance that
 alleges sexual abuse."

24
 25 The Court finds that this case is similar to Sapp. In that case, the Ninth Circuit set forth a
 26 standard for evaluating exhaustion: "a grievance suffices if it alerts the prison to the nature of the
 27 wrong for which redress is sought." Sapp, 623 F.3d at 824 (citing Griffin v. Arpaio, 557 F.3d 1117,
 28 1120 (9th Cir. 2009)). In Sapp, and in Griffin, the prison regulations required a summary of the

1 issues raised and the remedy requested. AR 740.05(6) is similar, and Plaintiff's grievance raised
 2 the background surrounding the incident, the force used against him, his reasons for believing such
 3 force was uncalled for, and his fear that he would be harmed again by Defendant Lona after the
 4 incident unless they were separated. Plaintiff's grievance exhausts his claim because it clearly put
 5 NDOC on adequate notice of the problem for which [Plaintiff] seeks redress. Sapp, 623 F.3d at
 6 824; Jones v. Bock, 549 U.S. 199, 218, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007).

7 In light of these facts, the Court must next consider whether the grievance was properly
 8 screened. Here, the Court finds ambiguities that do not support Defendant Lona's position.
 9 Defendant Lona does not explain how the six-month period to file an informal grievance is
 10 calculated *in this case*, given that Plaintiff was released a mere two weeks after the incident, and
 11 returned to custody after the six month period had passed. Furthermore, to the degree the grievance
 12 could have been refiled for failure to state a remedy, it was not made clear in the improper
 13 grievance form.

14 For these reasons, the Court does not find that Defendant Lona has met his burden of
 15 showing that Plaintiff failed to exhaust administrative remedies, as a matter of law.

16 **b. Excessive Force Claim**

17 The standard for an excessive force claim is clear. When prison officials are accused of
 18 using excessive force, the question for the Court is ". . . whether force was applied in a good-faith
 19 effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson v.
 20 McMillian, 503 U.S. 1, 6-7, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992); Whitley v. Albers, 475 U.S.
 21 312, 320-21, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986). Courts consider five factors in making this
 22 determination: (1) the extent of the injury suffered by the inmate; (2) the need for the use of force;
 23 (3) the relationship between the need and the level of force used; (4) the threat reasonably
 24 perceived by the responsible officials; and (5) any efforts made to mitigate the severity of the force
 25 used. Furnace, 705 F.3d at 1028-29 (citation and quotation marks omitted).

26 The extent of the injury suffered by the inmate or the "objective component" of the Eighth
 27 Amendment analysis, is "contextual and responsive to 'contemporary standards of decency.'" Hudson, 503 U.S. at 8 (citation omitted). Here, the parties dispute what action was taken by Lona,
 28

1 and if and how Plaintiff antagonized, threatened, or provoked him. Plaintiff provides sworn
2 statements that Lona struck him in the face twice, put him in a headlock, grabbed him by the ankles
3 to take him down to the floor. ECF No. 93-5. Lona then flipped Plaintiff onto his back and placed
4 his knee in Plaintiff's back until he was relieved. Id. Plaintiff states that he had complied with
5 Lona's orders to get handcuffed, by placing his hands on the wall, and then behind his back, as
6 ordered. Id. The trigger for the altercation, in addition to the random cell search that left Plaintiff's
7 cell "trashed," was his complaint to Lona that the cuffs were on too tight. Id.

8 Lona argues that the officer reports associated with the incident tell a different story, but
9 that there is no dispute of material fact that could allow the Court to rule in Plaintiff's favor.
10 Specifically, Lona argues that despite the factual disputes in this case, the Court can rule as a matter
11 of law that these facts do not support an Eighth Amendment claim for excessive force because
12 Plaintiff suffered no injury. Lona argues that Plaintiff's sworn statement in his informal grievance
13 does not mention that he was offered medical care, but he does admit in his briefing that he refused
14 to sign a waiver for liability for refusal to receive medical care. Lona next argues that he was
15 threatened by Plaintiff, who was verbally antagonistic; just because Plaintiff was in restraints does
16 not negate the fact that his behavior was reasonably perceived as a threat.

17 It is unclear that this was an emergency based on the undisputed facts. See Jordan v.
18 Gardner, 986 F.2d 1521, 1528 (9th Cir. 1993) (en banc) (finding the absence of an emergency is
19 probative of whether force was applied maliciously or sadistically). There is also a dispute as to
20 the reason why the waiver is not signed. The Court finds a reasonable juror could conclude that
21 Plaintiff refused to sign the waiver because he was not offered medical care in the first place, and
22 that based on Plaintiff's verified complaint Lona physically harmed Plaintiff in myriad ways that
23 reasonably required medical care after the incident. The parties dispute the actions Plaintiff and
24 Lona took during the January 30, 2018 incident, which are prerequisites to analyzing the remaining
25 Hudson factors. Therefore, the Court denies Lona's motion as to Plaintiff's excessive force claim.

26 **i. Qualified Immunity**

27 Lona finally argues that he is entitled to qualified immunity. The qualified immunity
28 inquiry has two prongs: "(1) whether, taken in the light most favorable to the party asserting the

1 injury, the facts alleged show the official's conduct violated a constitutional right; and (2) if so,
 2 whether the right was clearly established in light of the specific case." Robinson v. York, 566 F.3d
 3 817, 821 (9th Cir. 2009) (citing Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed.
 4 2d 272 (2001)).

5 Under the second prong, courts "consider whether a reasonable officer would have had fair
 6 notice that the action was unlawful." Tarabochia v. Adkins, 766 F.3d 1115, 1125 (9th Cir. 2014)
 7 (internal quotation marks omitted). The Ninth Circuit has "never required a prior case on all fours
 8 prohibiting that particular manifestation of unconstitutional conduct to find a right clearly
 9 established." Torres v. City of Madera, 648 F.3d 1119, 1129 (9th Cir. 2011) (citation omitted)
 10 (internal quotation marks omitted). It is enough that officers have "fair warning" that their conduct
 11 is unlawful. Hope v. Pelzer, 536 U.S. 730, 741 (2002). In deciding a claim of qualified immunity
 12 where a genuine issue of material fact exists, the court accepts the version asserted by the non-
 13 moving party. Ellins v. City of Sierra Madre, 710 F.3d 1049, 1064 (9th Cir. 2013); Coles v. Eagle,
 14 704 F.3d 624, 629 (9th Cir. 2012). Summary judgment must be denied where a genuine issue of
 15 material fact exists that prevents a finding of qualified immunity. Sandoval v. Las Vegas Metro.
 16 Police Dep't, 756 F.3d 1154, 1160 (9th Cir. 2014).

17 The Court finds that there are genuine issues of disputed fact that prevent the application
 18 of qualified immunity. Here, the parties dispute both (1) whether Lona was provoked by Plaintiff;
 19 (2) what specific actions Lona took on the date of the incident, and (3) whether his actions were
 20 reasonable under the circumstances. Plaintiff's version of the facts is that he was in restraints, he
 21 shouted while he was in restraints, he was not a threat, complied with orders, and was not
 22 provoking Lona, and that Lona physically assaulted him with such force that he aggravated an
 23 existing back injury. Specifically, Plaintiff alleges that after Lona placed him in handcuffs, with
 24 his arms behind his back, Lona punched Plaintiff in the face; tried to put him in a headlock; grabbed
 25 his legs below the knee and slammed him onto his back. Here, the facts alleged "[t]aken in the
 26 light most favorable to the party asserting the injury, . . . show the officer's conduct violated a
 27 constitutional right." Saucier, 533 U.S. at 201. The law regarding a correctional officers' use of
 28 excessive force was clearly established on the date of this incident. See Hudson v. McMillian, 503

U.S. 1 (1992); Whitley v. Albers, 475 U.S. 312 (1986). At the time of this incident, it was clearly established that an individual may not be subjected to significant force when he has not resisted, or has merely engaged in passive resistance to, an officer's commands. Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1093 (9th Cir. 2013) ("The right to be free from the application of non-trivial force for engaging in mere passive resistance was clearly established prior to 2008"). For these reasons, the Court does not find that Lona is entitled to qualified immunity at this juncture.

c. Deliberate Indifference Claim

A prison official violates the Eighth Amendment when he acts with "deliberate indifference" to the serious medical needs of an inmate. Farmer v. Brennan, 511 U.S. 825, 828, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). "To establish an Eighth Amendment violation, a plaintiff must satisfy both an objective standard—that the deprivation was serious enough to constitute cruel and unusual punishment—and a subjective standard—deliberate indifference." Snow v. McDaniel, 681 F.3d 978, 985 (9th Cir. 2012).

The Court finds that there are genuine issues of disputed fact as to this claim. Plaintiff's sworn statements in his Amended Complaint state that immediately after the January 30, 2018 incident, however, "[his] back was never checked due to wrong timing of medical. [He] was taken to the hole . . . stripped of . . . property," and that "[he] asked for an emergency grievance but was denied." ECF No. 19 p.5. In his response to Defendant's motion, Plaintiff further argues that "the video footage that the A.G. told [him] she wouldn't be able to get would show that [he] never refused medical treatment and refused to sign a waiver of liability for medical treatment because medical was never refused [in the first place]." ECF No. 95 at 2 (emphasis in original). Plaintiff also argues that "Lona and others knew about [Plaintiff's] back condition because [Plaintiff] personally told them . . . and [he] can testify to that extent." Id. at 3.

Summary judgment is appropriate only if, viewing the evidence in the light most favorable to the party opposing the motion, the court finds that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To reiterate, Plaintiff's presentation of the facts is as follows: He sustained a back injury when attempting to remove himself from Defendant Dubree's sexual advances in a separate

1 incident, and the injury was exacerbated through his January 30, 2018 incident with Defendant
2 Lona, when Lona violently threw him onto his back while he was in handcuffs. He experienced
3 pain immediately after the incident, and he was not provided medical care. He was asked to waive
4 medical care, and he refused to sign the waiver because he was never offered care. As a result of
5 the January 30, 2018 incident, Plaintiff sustained a level of back injury that he had not previously
6 experienced. He is now taking medication for back related issues. Plaintiff states, in his verified
7 complaint, that the medical crew did not arrive in time for him to be seen after the January 30,
8 2018 incident, and that he was immediately placed in segregation after the incident. Plaintiff states
9 that he suffered back injuries that were exacerbated by the Lona incident and that came to a head
10 in 2019. He argues that after being punched, placed in a headlock, and taken forcefully to the
11 ground by Lona, Lona prevented Plaintiff from getting requisite medical care by moving him to
12 segregation prematurely, which is an act of deliberate indifference.

13 The parties dispute the degree of force Lona used on Plaintiff on January 30, 2018, and
14 whether Plaintiff refused medical care or whether Lona called medical to the scene in a timely
15 fashion. There are meaningful disputes relating to both the objective and subjective elements of
16 Plaintiff's Eighth Amendment claim. See, e.g., Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006)
17 (noting that failure to treat a prisoner's condition" can result in further injury or the "unnecessary
18 and wanton infliction of pain"); Ortiz v. City of Imperial, 884 F.2d 1312, 1314 (9th Cir. 1989)
19 (finding that plaintiff can show deliberate indifference where access to medical staff is meaningless
20 or incompetent). Therefore, Lona's motion for summary judgment as to this claim is denied.

21 **i. Qualified Immunity**

22 Lona also argues that he is entitled to qualified immunity. In deciding a claim of qualified
23 immunity where a genuine issue of material fact exists, the court accepts the version asserted by
24 the non-moving party. Ellins, 710 F.3d at 1064 (9th Cir. 2013). Here, as referenced in the prior
25 section addressing Plaintiff's Excessive Force claim against Lona, Plaintiff's version of the facts
26 suggests Lona punched him, placed him in a headlock, and pinned him down to the ground after
27 he was already in restraints; that the medical team did not arrive before he was placed in
28 segregation; that he did not sign Defendants' waiver form because he did not waive medical care

1 because it was never offered to him in the first place; that the injuries sustained in the January 30,
 2 2018 incident did require immediate medical care, and that after he was placed in segregation,
 3 Plaintiff requested an emergency grievance form but was not provided with one. He was out of
 4 custody thirteen days later. The parties do dispute whether medical was called and if meaningful
 5 care was provided or offered to Plaintiff, who was still in restraints, before he was transferred to
 6 segregation. It was clearly established law at the time of the incident that deliberate indifference
 7 occurs "when prison officials deny, delay or intentionally interfere with medical treatment," and
 8 the delay leads to further harm to the inmate. McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th
 9 Cir. 1992), overruled on other grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th
 10 Cir. 1997) (en banc). The Court finds that there are genuine issues of disputed fact as to this claim
 11 and that Plaintiff's asserted version of facts based upon disputed facts establishes a violation of
 12 clearly established rights. Therefore, in light of the facts in dispute, the Court denies Lona's claim
 13 for qualified immunity related to Plaintiff's Eighth Amendment Deliberate Indifference claim at
 14 this juncture.

15 **C. Plaintiff's Motion for Reconsideration**

16 "As long as a district court has jurisdiction over the case, then it possesses the inherent
 17 procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to
 18 be sufficient." City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper, 254 F.3d 882, 885
 19 (9th Cir. 2001) (citation and quotation marks omitted).

20 However, "a motion for reconsideration should not be granted, absent highly unusual
 21 circumstances, unless the district court is presented with newly discovered evidence, committed
 22 clear error, or if there is an intervening change in the controlling law." Marlyn Nutraceuticals, Inc.
 23 v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009) (citation omitted). A motion
 24 for reconsideration "may not be used to raise arguments or present evidence for the first time when
 25 they could reasonably have been raised earlier in the litigation." Id.

26 Here, Plaintiff asks the Court to reconsider its prior order dismissing Defendants Wharton
 27 and Dubree from the case. However, the Court's prior order only dismisses Defendant Wharton.
 28 Defendants Dubree and Wharton were reinstated in the case on Plaintiff's prior Motion for

1 Reconsideration (ECF No. 57), which the Court granted on November 29, 2021. ECF No. 82. The
2 Court found that “Plaintiff has complied with the directions of the Court . . . and has otherwise
3 sufficiently satisfied service requirements. Claims against William Wharton and Mark Dubree are
4 reinstated.” Id.

5 Then, Plaintiff filed a Motion for Default Judgment on December 2, 2021. ECF No. 83.
6 On May 4, 2022, the Court dismissed all claims against Defendant Wharton without prejudice
7 pursuant to Fed. R. Civ. P. 4(m). ECF No. 100. As of today, Defendant Dubree is still a party to
8 the lawsuit. Plaintiff argues that service has been completed on Mr. Wharton, as the Court itself
9 noted in granting Plaintiff’s Motion for Reconsideration. First, Plaintiff complied with all service
10 requirements. On March 17, 2021, the U.S. Marshal service sent back the forms because Plaintiff
11 had not signed the forms. Plaintiff quickly rectified the issue and signed the forms on March 23,
12 2021. Plaintiff believes that service was completed. In his Motion for Reconsideration, Plaintiff
13 respectfully asks the Court what, if anything, he needs to do further: “There has been ongoing
14 confusion about the service of defendants William Wharton and Mark Dubree. I’ve sent the proof
15 of service to the Courts many times now, so I’m very confused as to what the issue is.”

16 The Court agrees with Plaintiff. The May 4, 2023 Order dismissing Defendant Wharton
17 without prejudice was filed in error. As the Court has stated previously, Plaintiff has complied
18 with service requirements as to Defendants Wharton and Dubree. ECF No. 82. The Court therefore
19 vacates its prior order (ECF No. 100).

20 21 **VI. CONCLUSION**

22 **IT IS THEREFORE ORDERED** that Defendant Lona’s Motion for Summary Judgment
23 (ECF No. 93) is DENIED.

24 **IT IS FURTHER ORDERED** that Plaintiff’s Amended Motion for Summary Judgment
25 (ECF No. 98) is DENIED.

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1 Good cause being found, **IT IS FURTHER ORDERED** that Plaintiff's Motion for
2 Reconsideration (ECF No. 101) of the Court's Order (ECF No. 100) is GRANTED. The Court
3 VACATES its prior order, and the Clerk of Court is directed to reinstate Defendant William
4 Wharton to this action.

5 **IT IS FURTHER ORDERED** that the Parties have forty-five days from the date of this
6 order to file a Proposed Joint Pretrial Order.

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8 DATED: March 31, 2023.

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12 **RICHARD F. BOULWARE, II**
13 **UNITED STATES DISTRICT JUDGE**
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